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Supreme Court, U.S.
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NO. 92-689

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

JACQUELINE McMILLAN,
Petitioner

vs.

ISAAC C. HUNT, JR., et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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COUNTERSTATEMENT OF THE CASE

The Statement of the Case prepared by Jacqueline McMillan ("Petitioner") is factually accurate. However, in order to place into context her arguments that the Respondents arbitrarily charged her with non-academic violations and that they used expulsion procedures that were inadequate to insure against a deprivation of her constitutional rights, additional facts are necessary.

Professor Cohen ("Cohen") was director of The University of Akron Law School ("Law School") legal writing program. After reviewing the papers prepared by Petitioner and another student, Sara Rich ("Rich"), and noting the patent similarities, he decided to conduct his own investigation before filing a report with the Student Disciplinary Committee ("Committee") which would trigger the procedures contained in the Student Disciplinary Code ("Code"). He interviewed Petitioner and Rich, reviewed the supposed rough drafts of their papers, and then decided to file a report describing only Petitioner as a suspected violator of the Code. Cohen did nothing, however, to prevent the Committee from investigating Rich.

After Cohen filed his report, the "Investigation of Violations" section of the Code was implemented. The Petitioner was notified that a charge had been filed against her. Professor Grant ("Grant"), as chairperson of the Committee, made an initial determination that there was reasonable suspicion that a violation of the Code had taken place. He appointed Professor Rich (unrelated to Sara Rich, the Petitioner's roommate) to investigate the case. Professor Rich conducted an investigation which included interviews with all persons involved. He rendered a written report to Grant, who then determined that there was probable cause that a violation had been committed by Petitioner.

After the determination of probable cause, the Petitioner was provided with notice on February 28, 1991, formally charging her with certain specific violations of the Code. The notice also informed her of the hearing date.

The hearing took place on March 29 and March 30, 1991. Before the testimony began, Petitioner's counsel objected to the participation of two of the seven members of the Committee. Petitioner objected to a student member because one night Petitioner had blocked his car in an apartment parking lot. That member, also a law student, said he could be fair and was then questioned by one of the attorneys for Petitioner. The Committee members were polled as to the continued participation of that student member. Nobody wanted him removed.

Petitioner also objected to the participation of Grant as a voting member of the Committee because he had made the initial determination of probable cause. Grant stated that he had "not prejudged the case" and intended to follow the provisions of the Code which provide that the chairperson is a voting member.

At the hearing the Petitioner was represented by two attorneys. Nobody requested that the witnesses be sworn. The University called three witnesses, including Cohen and Rich. Counsel for the Petitioner cross-examined those witnesses and made objections throughout the course of the two-day hearing. Petitioner presented witnesses and had the opportunity to offer other evidence. In addition to herself, Petitioner called three witnesses including Petitioner's mother. After the hearing, the Petitioner was provided with a copy of the 235-page hearing transcript.

The Code provides that 60 percent of the Committee members participating in the hearing must concur in order to find a violation. By a 5-2 secret ballot vote, the Committee found that Petitioner had violated the Code by turning in another student's work as her own. The Committee then unanimously recommended expulsion.

Petitioner appealed the Committee's decision to the Dean of the Law School, Isaac C. Hunt, Jr., in the manner provided by the Code. Dean Hunt reviewed all the evidence and the transcript of the hearing, and on April 4, 1991 issued a written decision upholding the finding and recommendation of the Committee. Thereafter, the Petitioner was expelled from the Law School for violating the Code.

REASONS FOR DENIAL OF THE WRIT

WHEN A STUDENT SUSPECTED OF PLAGIARISM ON A LAW SCHOOL PAPER IS THE SUBJECT OF TWO INVESTIGATIONS BEFORE BEING ACCUSED OF VIOLATING THE STUDENT HONOR CODE, IS GIVEN DETAILED NOTICE OF THE CHARGES, IS REPRESENTED BY COUNSEL DURING A HEARING BEFORE A STUDENT DISCIPLINARY COMMITTEE DURING WHICH THE STUDENT'S COUNSEL CALLS AND CROSS-EXAMINES WITNESSES, AND IS ABLE TO HAVE THE COMMITTEE'S FINDING REVIEWED BY THE DEAN OF THE LAW SCHOOL, THE STUDENT HAS RECEIVED SUFFICIENT PROCESS TO PREVENT AN ERRONEOUS DEPRIVATION OF CONSTITUTIONAL RIGHTS.

In Goss v. Lopez, 419 U.S. 565 (1975), this Court held that students facing disciplinary suspensions receive due process when they are given some kind of notice and are afforded some kind of hearing. Id. at 579. The concept of due process is a flexible one tailored to the protections each particular situation demands. Morrissey v. Brewer, 408 U.S. 471 (1972). "Once it is determined that due process applies, the question remains what process is due." Id. at 481. Regardless of whether this case presents an academic or disciplinary dismissal, the Petitioner received all the process she was due. Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978).

The Code was designed to provide students with significant procedural safeguards. The Code contains a system of checks to ensure that a student accused of violating the Code is not subjected to the disciplinary process without justification, and, if subjected to the disciplinary process, that the student is accorded significant procedural protection. After receiving a report that a student is suspected of violating the Code, the chairperson of the Committee decides whether there is reasonable suspicion that the Code has been violated. If so, the chairperson appoints an investigator who conducts an investigation and then makes a written report to the chairperson summarizing the investigation. The chairperson also informs the student that a report has been filed. Based upon the report of the investigator, the chairperson determines whether

probable cause that a violation of the Code exists sufficient to bring the matter before the Committee for hearing. The accused student is then provided with notice of the probable cause determination, details of the violation alleged, and notice of the hearing date.

At the hearing the student may be represented by anyone, including an attorney. The Code permits the student to cross-examine witnesses and present witnesses and other evidence. After the hearing, if the Committee by secret ballot votes to find a violation of the Code, the student may appeal that finding to the Dean of the Law School. The Dean is required to render a decision in writing.

Here the Petitioner received all the process provided by the Code: process which was constitutionally adequate. She received notice of the filing of the charge. After Grant determined that there was sufficient cause to proceed with a hearing, she received details of the alleged violation and notice of the hearing date. She had ample time to prepare her case. She was represented by two attorneys at the hearing. Her attorneys cross-examined the witnesses presented against her. Later, her attorneys presented witnesses and evidence to the Committee. She appealed the Committee's adverse decision to the Dean of the Law School, who rendered a written decision upholding the Committee's finding and recommendation of expulsion. In short, the Petitioner received all the process she was due and more, including adequate notice and a full and fair opportunity for a hearing.

Significantly, Petitioner does not contend that the procedures set forth in the Code were not followed. Instead, she contends that she was entitled to even more stringent procedural requirements. She argues that the witnesses were not placed under oath, but fails to note that she did not request that witnesses be sworn. She complains that two members of the Committee should not have voted, yet fails to note that both individuals said they could be fair and that even if the two had recused themselves, there still would have been a finding against her by the requisite 60 percent majority, regardless of how the two members in question actually voted. Finally, she argues that she came before the Committee with a presumption of guilt. The Code sets forth a deliberate step-by-step

process designed specifically to avoid arbitrary action. Grant reviewed the initial report by Cohen and the subsequent investigation by Professor Rich before finding there was sufficient probable cause to conduct a hearing. The Petitioner received notice of the charge. She had ample opportunity to prepare her case. She was represented by counsel at the hearing before seven individuals. The entire proceedings were reviewed by the Dean of the Law School. The procedure accorded to the Petitioner was anything but arbitrary. She was not brought to the Committee with a presumption of guilt. No student charged with a violation of the Code is brought before the Committee with a presumption of guilt. Cohen's investigation does not distinguish Petitioner's case from any other.

This Court has long held that there is no rigid formula to be applied when examining whether an individual has been accorded due process. "But we have frequently emphasized that '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation'." Horowitz, 435 U.S. at 86 (quoting Cafeteria Workers v. McElroy, 376 U.S. 886, 895 (1961)). The concept that due process need not be perfect process was described as follows in Matthews v. Eldridge, 424 U.S. 319, 348-349 (1976):

> The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' [Citation omitted.] All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' [citation omitted], to insure that they are given a meaningful opportunity to present their case.

As the court of appeals properly concluded, nothing in the record provides a basis upon which to argue that the process accorded Petitioner was insufficient. The court of appeals summarized that process as follows:

> The record indicates that McMillan received notice of the charges that were being brought against her in

> a hearing before the law school's Disciplinary Committee. At the two-day meeting, McMillan was represented by two attorneys and had ample opportunity to present her evidence in considerable detail. Each side had an opportunity to call witnesses and present their version of the events. In addition, the record indicates that the Disciplinary Committee based their finding of academic dishonesty on sufficient evidence. This evidence includes the striking similarity between the final papers, testimony that indicated that Sara Rich finished her paper several hours before McMillan finished her paper, and that approximately one week prior to the due date, McMillan was seen leaving Sara Rich's room.

McMillan v. Hunt, No. 91-3843 (6th Cir. July 21, 1992), Petitioner's Appendix at A-3.

Finally, the errors alleged by the Petitioner are not sufficient to justify the issuance of a writ of certiorari. "A review on writ of certiorari is not a matter of right, but of judicial discretion," and "will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. Review on a writ of certiorari may be granted when an application of law differs among the circuit courts of appeals, when a decision of a state court of last resort improperly decides a federal question, or when a decision of the United States court of appeals is in conflict with law established by this Court. Id.

Petitioner does not point to any conflict of law among the circuits. She argues that by failing to discuss the distinction between academic actions and disciplinary actions, the court of appeals somehow erred. But that argument ignores the real issue of whether Petitioner received all the process she was due. The court of appeals addressed that issue and properly held that the procedures were adequate. There is no conflict between the decision below and the decisions of this Court.

CONCLUSION

Petitioner claims that she was accorded inadequate due process as she was expelled from law school. Petitioner was afforded ample notice of the plagiarism charges, a full and complete opportunity to present her case before a seven-member committee, and an appeal to the Dean of the Law School. While she disagrees with the result, she in fact was accorded with vastly more process than she was due. Respondents submit that there are no special and important reasons for granting a writ.

Respectfully submitted,

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